Filed 8/24/12 Bartoni v. American Medical Response CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LAURA BARTONI et al., Plaintiffs and Respondents, v. AMERICAN MEDICAL RESPONSE WEST, Defendant and Appellant.	A130333 (Alameda County Super. Ct. No. RG08382130; JCCP NO. 4604)

INTRODUCTION

Defendant American Medical Response West (AMR West) appeals from an order of the Alameda County Superior Court denying its motion to compel arbitration of wage and hour claims by current and former employees, alleging statutory and state law violations regarding meal periods, rest breaks, and overtime pay. Defendant contends the trial court erred in refusing to compel arbitration of plaintiffs' wage and hours claims, where it determined the collective bargaining agreements (CBAs) between the union and defendant did not contain a "clear and unmistakable" waiver of plaintiffs' right to a judicial forum for their statutory claims.

Plaintiffs counter that the court's order denying the motion to compel arbitration should be affirmed, not only on the ground stated by the superior court, but also because the CBA procedures failed to meet minimum standards for an adequate forum to vindicate statutory rights; because defendant's motion was flawed, in that the unions were not parties to the underlying action and the trial court had no power to order

arbitration as sought in defendant's motion; because defendant waived any right to seek arbitration by delaying its motion for two and one-half years and then exploited its delay by using the judicial forum to conduct extensive discovery and to vigorously litigate a series of law and motion matters brought by defendant in state and federal courts. We shall affirm the order on the sole ground stated by the superior court: that the CBAs did not clearly and unmistakably waive plaintiffs' right to bring statutory claims in a judicial forum. We therefore do not address the additional bases for affirmance posited by plaintiffs and disputed by defendant.

BACKGROUND

The Parties

Defendant AMR West is a California corporation that provides ambulance and related emergency services throughout Northern California. It employs both ambulance dispatchers and emergency medical technicians (EMTs or "field employees"). The action was brought by plaintiffs Laura Bartoni, Cameron Francis, Heather Murray, and Jefferson Todd Wilhoyte, former or current employees of defendant, who worked as EMTs or dispatchers during the period of April 16, 2004, through the present. As part of their lawsuit, plaintiffs also seek to represent a combined class of AMR West dispatchers and field employees. [1]

The CBAs

At all relevant times, plaintiffs worked under CBAs negotiated by a labor union representing them and their fellow workers. Before 2006, they were represented by Health Care Workers Union, Local 250 SEIU (SEIU Local 250). In 2006, the National Emergency Medical Services Association (NEMSA) replaced SEIU Local 250 as the unit's collective bargaining representative. Three CBAs cover the period: (1) an agreement with SEIU Local 250 from July 2001 to June 2006; (2) a NEMSA agreement

[1] Plaintiffs have alleged violations of the Labor Code and applicable Industrial Welfare Commission (IWC) wage order on behalf of a prospective class of thousands of EMTs and hundreds of dispatchers. Their lawsuit is part of a coordinated proceeding with other actions affecting different putative classes in which motions to compel arbitration have not been filed.

from July 2006 to June 2008 (with related memoranda of understanding); and (3) a NEMSA agreement from July 2008 to June 2011.

Section 6 of each of the three labor agreements sets forth the grievance and arbitration procedure. Section 6.1 states in relevant part:

"**6.1 Grievance Procedure**

"The purpose of this procedure is a timely adjustment of grievances by the Employer and the Union following a prompt investigation and thorough discussion. In the event any grievance arises concerning the interpretation or application of any of the terms of this Agreement, and/or any dispute concerning wages, benefits and working conditions, such matters shall be adjusted according to the procedures and conditions set forth below.

"Employees should attempt to resolve problems informally with their immediate supervisor before resorting to the grievance procedure. Any agreement between the employee and the supervisor will be a non-precedent setting settlement."

Thereafter all three CBAs provide a three-step grievance process in which the third step is "final and binding" arbitration. Arbitration may be initiated after a grievance has been pursued though the first two steps without resolution. All three CBAs limit the arbitrator's power by providing either that "[t]he arbitrator shall have no power to add to, subtract from, or otherwise modify any provision of this Agreement," or that "[t]he arbitrator shall have no authority to alter, change, ignore, delete from, or add to the provisions of this Agreement."

None of the CBAs contains any provision requiring defendant to comply with the Labor Code or applicable IWC wage order, or with state or federal law in general. The first and second CBAs, covering the period from July 2001 to June 2008, further state in section 6.4 that, "[a]ny other complaint that is not covered by the terms and conditions of the Agreement may be taken up to Step 2 of the grievance procedure. The decision at the Step 2 level may not be taken to arbitration."

Procedural History

Bartoni filed her original complaint against defendant and four other allegedly related entities, on behalf of herself and others similarly situated, in April 2008. She alleged four causes of action under California law: (1) failure to pay overtime wages in violation of Labor Code sections 510 and 1194 and applicable IWC wage orders; (2) failure to provide meal and rest periods in violation of Labor Code sections 226.7 and 512, and IWC wage orders; (3) violation of Labor Code sections 201 through 203, in failing to promptly pay all overtime wages owed and to properly compensate for meal and rest periods promptly upon the end of employment of dispatchers who have left employment; and (4) violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.).

Defendant answered the complaint in May 2008, raising Bartoni's alleged failure to exhaust the "grievance and arbitration" provisions of the CBAs as affirmative defenses.

In August 2008, defendant removed the case to federal court, based upon the CBAs and federal labor law preemption. In June 2009, the federal court granted Bartoni's motion to remand the matter to the state court. Defendant then petitioned to coordinate the case in Los Angeles County with two other later-filed actions alleging similar claims against defendant. Defendant did not mention its position that the other cases were not governed by CBAs requiring grievance and arbitration and that some plaintiffs, but not others, were required to arbitrate their claims. Rather, it argued that coordinating the three actions "before one judge" in Los Angeles County would prevent inconsistent rulings and described the court system as the appropriate forum for all the cases. Coordination was granted and the proceeding was assigned to Alameda County Superior Court and Judge Freedman.

Bartoni was granted leave to file an amended complaint and did so in March 2010. This complaint named only AMR West as a defendant, changed the proposed class to include both dispatchers and field employees, and added three new class representatives, plaintiffs Francis, Murray, and Wilhoyte. Defendant successfully moved to strike Bartoni

as a party on grounds she lacked standing to pursue claims arising during the pertinent period. The court granted leave to amend and, on September 10, 2010, plaintiffs filed a second amended complaint—the operative complaint here.

The second amended complaint alleged essentially the same causes of action as the original complaint (stated as three causes of action) for (1) failure to provide meal and rest periods (Lab. Code, §§ 226.7, 512, 201, 202, and 204, and IWC wage orders); (2) failure to pay overtime wages (Lab. Code, § 510, 1194, 201, 202, 204, and IWC wage orders); and (3) violation of Business and Professions Code section 17200 et seq. Plaintiffs sought statutory penalties pursuant to Labor Code sections 203 and 210 for the asserted Labor Code violations. Plaintiffs prayed for certification of the class, for their appointment as class representatives, for declaratory and injunctive relief, for an equitable accounting, for compensatory damages and interest, and for reasonable attorney fees.

Defendant answered on September 20, 2010. On October 13, 2010, defendant moved to compel arbitration. Before defendant moved to compel arbitration, the parties had engaged in extensive law and motion proceedings and defendant had conducted extensive discovery, including propounding special and form interrogatories, requests for document production, and requests for admission.

Following a hearing held November 5, 2010, the court denied defendant's motion to compel arbitration on the ground that it was not "clear and unmistakable" under the CBAs that plaintiffs must arbitrate their statutory wage claims. In so ruling, the court refused to consider plaintiffs' alternative claim that defendant had waived its right to arbitration by delay. The court also declined to consider or to take judicial notice of materials submitted by plaintiffs in support of their claim of waiver. Defendant filed this timely appeal of the court's denial of its motion to compel arbitration. (Code Civ. Proc., § 1294, subd. (a).)

DISCUSSION

I. Standard of Review

We independently review the trial court's order denying defendant's petition to compel arbitration. " 'We have no need to defer, because we can ourselves conduct the same analysis,' which 'involves a purely legal question or a predominantly legal mixed question.' [Citation.]" (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348-349; accord, *Flores v. Axxis Network & Telecommunications, Inc.* (2009) 173 Cal.App.4th 802, 805 (*Flores*) [de novo review of denial of a petition to compel arbitration]; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71 [same]; see also *Collins v. Lobdell* (9th Cir 1999) 188 F.3d 1124, 1127.)

II. Waiver of a Judicial Forum for Statutory Claims in CBAs

The Law

Provisions in a CBA that "clearly and unmistakably" require union members to arbitrate statutory claims are enforceable as a matter of federal law. (*14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 251 (*14 Penn Plaza*).) The United States Supreme Court established the "clear and unmistakable" standard for determining whether a CBA suffices to waive an employee's right to a judicial forum for statutory claims in *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70 (*Wright*). In *Wright*, a longshoreman employee filed suit under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), when he learned that stevedoring companies would not hire him because he had previously settled a claim for permanent disability. (*Id.* at pp. 74-75.) The district court dismissed the case because the employee had failed to pursue grievance procedures set forth in the CBA and seniority plan covering his employment. (*Id.* at p. 75.) The Fourth Circuit affirmed (*ibid*), and the United States Supreme Court reversed, holding the CBA in the case did "not contain a *clear and unmistakable waiver* of the covered employees' rights to a judicial forum for federal claims of employment discrimination." (*Id.* at p. 82, italics added.)

The Supreme Court observed that in the context of CBAs there is generally a presumption of arbitrability of issues that are arguably within the scope of the agreement.

(*Wright, supra,* 525 U.S. at pp. 77-78.) "That presumption, however, does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA.* [Citations.] . . . The dispute in the present case, however, ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute. The cause of action Wright asserts arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement. [Citations.]" (*Id.* at pp. 78-79.) Even if the CBA created contractual rights coextensive with the federal statutory right, "the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement." (*Ibid.*) Accordingly, "any CBA requirement to arbitrate [a statutory claim] must be *particularly clear*." (*Id.* at p. 79, italics added.) "[T]he right to a federal judicial forum is of sufficient importance to be protected against less-than explicit union waiver in a CBA." *Wright* adopted the standard articulated in *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, that certain union waivers of statutory rights "must be clear and unmistakable." (*Wright,* at pp. 79-80.)

Wright held that neither the CBA nor the seniority plan in that case met the "clear and unmistakable" standard. (*Wright, supra,* 525 U.S. at p. 80.) The CBA provided in relevant part: "[T]his Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement." (*Wright, supra,* 556 U.S. at p. 73.) It further stated that "[m]atters under dispute which cannot be promptly settled between the Local and an Individual Employer" were subject to arbitration. (*Id.* at pp. 72-73; see *Flores, supra,* 173 Cal.App.4th at pp. 805-806.) The employee was also subject to a seniority plan that contained its own grievance procedures, and specified that, "[a]ny dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising

out of any rule adopted for its implementation" was subject to those grievance procedures. (*Wright,* at pp 73-74; *Flores,* at p. 806.)

The Supreme Court determined the arbitration clause of the CBA was "very general, providing for arbitration of '[m]atters under dispute,' . . . which could be understood to mean matters in dispute under the contract. And the remainder of the contract contains no explicit incorporation of statutory antidiscrimination requirements." (*Wright, supra,* 525 U.S. at p. 80.) The court expressed doubt that the clause stating the agreement was "intended to cover all matters affecting wages, hours, and other terms and conditions of employment," even taken in isolation, could be considered a clear and unmistakable incorporation of employment discrimination laws. Were that the case, the court concluded it was "surely deprived of that effect by the provision, later in the same paragraph, that '[a]nything not contained in this Agreement shall not be construed as being part of this Agreement.' " (*Id.* at p. 81.) Nor did the court find a "clear and unmistakable waiver" in the seniority plan. "Like the CBA itself, the plan contains no antidiscrimination provision; and it specifically limits its grievance procedure to disputes related to the agreement." (*Id.* at pp. 81-82, fn. omitted.)

The Supreme Court answered a question left open in *Wright, supra,* 525 U.S. 70, 82, when it held in *14 Penn Plaza, supra,* 556 U.S. 247, that a provision in a CBA that clearly and unmistakably required union members to arbitrate statutory age discrimination claims was enforceable as a matter of federal law. (*14 Penn Plaza,* at pp. 255, 274; see, e.g., *Matthews v. Denver Newspaper Agency LLP* (10th Cir. 2011) 649 F.3d 1199, 1205 ["As the law now stands, both individual employees and unions may prospectively agree with the employer to arbitrate all employment-related disputes, including statutory rights normally enforced through litigation, but only so long as this intention is clearly expressed."] In rejecting the argument that an individual employee must *personally* "waive" a statutory right (*14 Penn Plaza,* at p. 259), the Supreme Court majority reaffirmed the *Wright* standard for determining whether statutory rights were waived in a CBA. It concluded that the employment-related discrimination claims sought to be brought by the employees, including claims brought under the Age Discrimination

in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., must be resolved in arbitration where the CBA *specifically referenced* various anti-discrimination statutes, including the ADEA, in its "no discrimination" clause and in the next sentence stated, "All such [discrimination] claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations."[2] (*14 Penn Plaza*, at p. 252, see *id.*, at pp. 258-259.) The court reiterated that in *Wright, supra,* 525 U.S. at page 80, it had required "only that an agreement to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement." (*14 Penn Plaza*, at pp. 258-259.) The CBA at issue met that standard as it "clearly and unmistakably requires [employees] to arbitrate the age discrimination claims at issue . . . ." (*Id.* at p. 260.)

In applying the *Wright* analysis to determine whether there has been a sufficiently explicit waiver, courts look to the generality of the arbitration clause, explicit incorporation of statutory requirements, and the inclusion of specific statutory provisions. "The test is whether a collective bargaining agreement makes compliance with the statute a contractual commitment subject to the arbitration clause. (*Wright,*] *supra,* 525 U.S. at pp. 80-81; [citation].)" (*Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 434-435 (*Vasquez*); see, e.g., *Flores, supra,* 173 Cal.App.4th at p. 807.)

California courts have looked to the two-part analysis described in *Carson v. Giant Food, Inc.* (4th Cir. 1999) 175 F.3d 325, 311 (*Carson*), to determine whether the parties to the CBA were " 'particularly clear' about their intent to arbitrate statutory

---

[2] The applicable section of the CBA in *14 Penn Plaza, supra*, 556 U.S. at page 252, provided: " '30 NO DISCRIMINATION. [§] *There shall be no discrimination* against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, *including, but not limited to, claims made pursuant to* Title VII of the Civil Rights Act, the Americans with Disabilities Act, *the Age Discrimination in Employment Act*, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. *All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations.* Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.' [Citation.]" (Italics added, fn. omitted.)

discrimination claims." (See, e.g., *Vasquez, supra, 80 Cal.App.4th* at p. 435; *Flores, supra.* 173 Cal.App.4th at p. 807.) "If an agreement does not clearly, explicitly, and unmistakably show that the parties intended to make statutory claims subject to arbitration, the *Vasquez* court stated that an alternative test for determining whether a dispute was subject to arbitration was the coupling of a general arbitration clause with an explicit incorporation of statutory antidiscrimination requirements elsewhere in the agreement. This combination had been upheld by courts as sufficient, provided another part of the agreement ' "makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, [then] employees will be bound to arbitrate their [state and federal statutory] claims." ' ([*Vasquez,*] at p. 435, quoting *Carson,* [at p.] 331.)" (*Flores,* at p. 807.)

Although *Wright, supra,* 525 U.S. 70, and *14 Penn Plaza, supra,* 556 U.S. 247, both involved claims of discrimination under federal law, their holdings apply to other federal and state statutory rights. (See *Jonites v. Exelon Corp.* (7th Cir. 2008) 522 F.3d 721, 725 (*Jonites*) [claims under the Fair Labor Standards Act (29 U.S.C. § 201 et seq.) (FLSA)]; *O'Brien v. Town of Agawam* (1st Cir. 2003) 350 F.3d 279, 284-286 [FLSA claims]; *Eastern Associated Coal Corp. v. Massey* (4th Cir. 2004) 373 F.3d 530 [state statutory workers compensation discrimination and disability discrimination claims]; *Martinez v. J. Fletcher Creamer & Son, Inc.* (C.D. Cal. 2010) 2010 WL 3359372 [FLSA claims and California wage and hour claims, including meal period claims].)

Application

The CBA at issue here provides in its arbitration section that: "In the event any grievance arises concerning the interpretation or application of any of the terms of this Agreement *and/or any dispute concerning wages,* benefits, and working conditions, such matters shall be adjusted according to the procedures and conditions set forth below." (Italics added.) Defendant maintains that this sentence clearly and unmistakably includes contract-related claims "*and/or*" other claims, and specifically identifies "any dispute concerning wages" among the grievances to be arbitrated. (We note that defendant frequently uses the term "claim" or "other claims" in its argument, whereas the language

of the CBA refers to "dispute.") Plaintiffs contend, to the contrary, that this is "general" language, much like that requiring arbitration of "matters under dispute" (*Wright, supra*, 525 U.S. at pp. 72-73) or of " 'all disputes' " (*Carson, supra*, 175 F.3d at p. 332), that falls short of a clear and unmistakable waiver. We agree with plaintiffs that the CBA in this case does not contain the type of "clear and unmistakable" waiver required to compel arbitration of state or federal statutory rights.

As observed by the Fourth Circuit, "[w]hile it is . . . possible to meet the clear and unmistakable waiver standard of [*Wright*], it is not easy." (*Eastern Associated Coal Corp. v. Massey, supra*, 373 F.3d at p. 534.) Where two plausible readings of the CBA are possible, we do not decide which interpretation is the correct one. "The fact that there are at least two plausible and competing interpretations . . . is enough to demonstrate that the [provision] fails to provide a clear and unmistakable waiver. [Citation.]" (*Id.* at p. 536, citing *Carson, supra*, 175 F.3d at p. 332 ["[w]e hold that clear and unmistakable does not mean general language that under ordinary principles of contract interpretation might very well be interpreted to require arbitration"].) A union waiver of employee statutory rights in a CBA can "be effected only by the most 'explicit' language, without any resort to inference." (*Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 405.) This principle appears fully applicable here.

As defendant sees it, the arbitration clause divides the grievances required to be arbitrated into two categories. The first comprise grievances "concerning the interpretation or application of any of the terms of this Agreement," that is, claims arising under the CBA. The second category, the description of which follows the words "and/or," consists of those "concerning wages, benefits, and working conditions." Defendant's contention that statutory wage claims are included in the second (or residual) category of arbitrable disputes is seemingly based on the assumptions that (1) disputes regarding wages, benefits and working conditions can arise *only* under either a contract or a statute (or both), and (2) the intermediary use of the phrase "and/or" indicates an intention to subject *all* such disputes to arbitration. Neither assumption is justified.

Disputes "concerning wages, benefits, and working conditions" may arise not just under a contract or statute but also under "the common law of the shop." (See *Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 581-582 ["the industrial common law—the practices of the industry and the shop" not expressed in the contract, but used by the arbitrator to fill gaps in the agreement].) Furthermore, the locution "and/or" cannot be deemed to reflect an intention to expand the universe of arbitrable disputes regarding wages, benefits and working conditions to all that could conceivably arise between the parties. As our Supreme Court recognized long ago in *In re Bell* (1942) 19 Cal.2d 488, 500, while "by its intentional equivocation," the phrase "and/or" may be "convenient," "[i]t lends itself, however, as much to ambiguity as to brevity."[3] Defendant's contention that the arbitration clause embraces statutory claims rests in large measure on the failure of the CBA to *expressly* exclude such claims from the description of arbitrable disputes. The absence of such an exclusion does not, however, support the presumption or inference defendant derives from it. As *Wright* instructs, the right to a judicial forum to resolve a statutory claim cannot be compromised by any "less-than explicit union waiver in a CBA." (*Wright, supra,* 525 U.S. at p. 79.) Because the CBAs before us contain no explicit reference to statutory claims or specific statutes, they do not constitute "clear and unmistakable" agreements to arbitrate statutory wage claims.

Nowhere in the agreement is there any reference to or incorporation of the wage and hour statutes or orders at issue in this case or to the waiver of *any* state or federal statutory claim. Hence, nothing in the CBAs indicate the second part of the analysis

[3] "A legal and business expression dating from the mid-19th century, *and/or* has been vilified for most of its life—and rightly so." (Garner, *Dict. of Modern Legal Usage* (2d ed. 1995) p. 56.) "Lawyers have been among *and/or*'s most ardent haters, though many continue to use it. The term has been referred to as 'that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning.' [Citation.]" (*Ibid.*)

described in *Vasquez, supra,* 80 Cal.App.4th at pages 434-435, and *Carson, supra,* 175 F.3d at page 311, would lead to a different conclusion.

Moreover, the two CBAs covering the period from July 2001 to June 2008, further state that "[a]ny other complaint that is not covered by the terms and conditions of the Agreement may be taken up to Step 2 of the grievance procedure. The decision at the Step 2 level may not be taken to arbitration." Such a provision further supports our interpretation that "complaint" based on an alleged statutory violation is not to be arbitrated. None of the CBAs at issue here explicitly provides otherwise.

Only a few cases relied upon by defendant hold that a CBA waiver of a statutory right was clear and unmistakable. Illustrative of such cases are the following, which involved statutory discrimination claims:

In *14 Penn Plaza, supra,* 556 U.S. 247, as described above, the CBA's "arbitration provision expressly cover[ed] both statutory and contractual discrimination claims." (*Id.* at pp. 264, see *id.* at p. 252. In *Aleman v. Chugach Support Services, Inc.* (4th Cir. 2007) 485 F.3d 206, the CBA stated: "The parties expressly agree that a grievance shall include any claim by an employee that he has been subjected to discrimination under Title VII . . . and/*or all other federal, state, and local anti-discrimination laws*' . . . ." (*Id.* at p. 216.) In *Coleman v. Southern Wine & Spirits of California, Inc.* (N.D. Cal. 2011) 2011 WL 3359743, the CBA contained a nondiscrimination clause and an arbitration clause providing: "It is the desire of both parties to this Agreement that disputes and grievances arising hereunder involving interpretation or application of the terms of this Agreement, *including any statutory or common law claims of sex, rage, age, disability or other prohibited discrimination,* shall be settled amicably or if necessary, by final and binding arbitration as set forth herein. (*Id.* at p. *7.) In addition, *Lewis v. Circuit City Stores, Inc.* (10th Cir. 2007) 500 F.3d 1140, 1143 (*Lewis*), granted preclusive effect to a prior arbitration decision where the plaintiff had submitted such claims to binding arbitration and where the arbitration agreement required arbitration of " 'any claims arising under federal, state or local statutory or common law . . . includ[ing], but not limited to . . . Title VII of the Civil Rights Act of 1964, . . . state discrimination

statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort." (*Lewis*, at p. 1143.) In all these cases, the arbitration clauses explicitly covered the type of statutory claims at issue.

Numerous California cases have concluded CBAs failed to clearly and unmistakably require arbitration of statutory claims. Most involve general arbitration clauses to the effect that disputes regarding interpretation and application of the agreement would be subject to arbitration. (See, e.g., *Flores, supra,* 173 Cal.App.4th at p. 808 [procedure for resolving disputes involving interpretation or application of the agreement, as well as disputes concerning wages, working hours and conditions]; *Marcario v. County of Orange, supra,* 155 Cal.App.4th at pp. 401, 405-407 [grievance may be filed if management's interpretation of MOU adversely affects employee's wages, hours or conditions of employment]; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 960 [grievance arising out of alleged violation of a specific provision of the agreement]; *Camargo v. California Portland Cement Co.* (2001) 86 Cal.App.4th 995, 1018 [arbitration of any dispute, difference, or grievance as to the meaning and application of and compliance with the provisions of the agreement]; *Vasquez, supra,* 80 Cal.App.4th at p. 433 [all grievances or disputes arising between the parties over the interpretation or application of the terms of the agreement]; *Martinez v. J. Fletcher Creamer & Son, Inc., supra,* 2010 WL 3359372, *1 [grievance procedure for enforcing all the terms and provisions contained in the agreement].)

Cases involving general arbitration language more closely approximating that of the instant CBA, have been found *not* to constitute the clear and unmistakable waiver of statutory rights required by *Wright, supra,* 525 U.S. 70. These include the following:

In *Jonites, supra* 522 F.3d 721, the Seventh Circuit, in an opinion by Judge Posner, held a CBA providing that " 'should any dispute or difference arise between the Company and the Union or its members as to the interpretation or application of any of the provisions of this Agreement *or with respect to job working conditions . . . ,* the dispute or difference shall be settled through the grievance procedure,' " was "not an 'explicit' waiver of the right to sue under the Fair Labor Standards Act; it is little

different from the corresponding language in the collective bargaining agreement in *Wright*[, *supra,* 525 U.S. at pp. 72-73]." (*Jonites*, at p. 725, italics added.) The language of the CBA provision in *Jonites* is similar to that of the CBA in this case, in that it also uses the conjunction "or" followed by a specific reference to "working conditions"—the issue in that case. We see no significant difference in the language present in the instant CBA that provides "and/or any dispute concerning wages, benefits, and working conditions . . . ."

In *Meyer v. Irwin Industries, Inc.* (C.D. Cal. 2010) 723 F.Supp.2d 1237, the court concluded that the CBA did not clearly or unmistakably require arbitration of the plaintiff's state law claims, where it provided: "The Company and the Union will make every effort to resolve differences and issues through discussion and mutual agreement. Should *any* controversy, dispute or disagreement arise during the term of this Agreement, there shall be no form of economic activity by either party against the other because of such controversy, disputes, or disagreement, but the difference shall be adjusted pursuant to these Grievance and Arbitration Procedures." (*Id.* at p. 1247, italics added.)

In *Prince v. Coca-Cola Bottling Co.* (S.D.N.Y. 1999) 37 F.Supp.2d 289, the CBA set forth the grievance procedure to be followed "[w]hen differences arise between the company, the Union or any employee of the Company as to any matter relating to wages, hours, or working conditions or employment, or any matter whatsoever including, the meaning, interpretation, application or violation of this Agreement." (*Id.* at p. 292.) The court held "[t]he broad language 'differences . . . relating to . . . working conditions or employment, or any matter whatsoever' could certainly be said to encompass complaints about a hostile working environment and sexual harassment. However, 'any matter whatsoever' is immediately qualified by the phrase 'including, the meaning, interpretation, application or violation of this Agreement.' Therefore, as in *Wright,* the grievance procedure provision of the CBA could be understood to pertain only to matters controlled by the contract." (*Id.* at pp. 292-293.) Nor did the arbitration clause that applied to " 'all complaints, disputes, controversies or grievances between the Company and its employees' " compel arbitration of the statutory claims. Recognizing that the

language was "more detailed than the 'matters under dispute' phrase used in the [CBA] in *Wright,*" and that "the terms 'disputes' and 'controversies' encompass legal claims that may be heard before state and federal courts," the court held, nevertheless, that "such language [did] not constitute a clear and unmistakable waiver of federal forum rights with respect to claims under Title VII."

In *Conde v. Yeshiva University* (NY 2005) 792 N.Y.S.2d 387, 16 A.D.3d 185, the court found no clear and unmistakable waiver of statutory rights to a judicial forum in a CBA general arbitration clause that provided "for arbitration of 'Any dispute, difference, or controversy related to wages, hours and working conditions,' which could be understood to mean only disputes concerning matters under the contract [citations]." (*Id.* at p. 186.)

Defendant contends the CBA distinguishes between contract and other claims with the language "and/or," and specifically lists "wages" among the latter types of covered disputes. Defendant argues there are no employee wage claims that would be unrelated to the agreement other than statutory claims and that the phrase must therefore refer to statutory claims or would be surplusage. This presupposes the phrase "*and/or any dispute concerning wages, benefits, and working conditions*" must be interpreted to refer to disputes *unrelated* to the agreement. We have determined that such interpretation is not required.

Moreover, during the terms of a CBA, numerous "disputes" may arise between the union and the employer over wages, benefits and working conditions that are not addressed in the CBA. If the parties agree in advance that such disputes must be adjusted according to the grievance and arbitration procedures set forth in the CBA, many disputes other than individual statutory claims would be covered. As plaintiffs point out, these disputes may concern anything from the quality of the soap in the employee restrooms to whether employees assigned to posts in high-risk neighborhoods should receive premium wages. Although the "zipper clause" of the CBAs, stating that the CBA is the "full and complete understanding" of the parties and waiving the right to bargain further over matters covered in the agreement, may prevent renewed bargaining over such matters, the

non-statutory dispute or grievance itself seem to be covered by the CBA. Therefore, defendant's "surplusage" argument fails. There appear to be numerous opportunities for disputes over *non-statutory* wage, benefit and working condition issues that could arise between the parties, that would not be expressly or explicitly covered by the agreement, but that would be swept into the grievance and bargaining procedures under the CBAs by the general language of this clause. Consequently, it is not true that the phrase at issue here would be surplusage, unless read to encompass statutory claims that the CBAs fail clearly and unmistakably to cover as required by *Wright, supra,* 525 U.S. at page 82.

Defendant relies on dictum in *Carson* that a CBA providing for arbitration of "*all federal causes of action* arising out of their employment" would suffice to compel arbitration of claims under all federal statutes. (*Carson, supra,* 175 F.3d at pp. 331-332, italics added [holding CBA arbitration clauses stating broadly that the parties agree to arbitrate all disputes over the meaning of the agreement did "not satisfy the demand of particular clarity"].) That was not the language confronted by the *Carson* court, and we do not believe it is similar to the general arbitration clause here. Whereas the clause "all federal causes of action" in *Carson* unambiguously references all *causes of action,* the arbitration clause here contains no such parallel language providing for arbitration of *all state causes of action* arising out of plaintiffs' employment. The arbitration clause in this case uses the term "*disputes*" rather than "*causes of action*," rendering it even less like the hypothetical language that *Carson* found would suffice to bind the parties to arbitrate their federal statutory claims.[4] Defendant also points to language it takes out of context in *Alderman v. 21 Club Inc.* (S.D.N.Y. 2010) 733 F.Supp.2d 461 (*Alderman*), arguing it stands for the proposition that a CBA providing that "*all causes of action* arising out of his employment" (italics added) would suffice to require arbitration of statutory overtime

[4] We note *Carson* dictum also recognizes that "[g]eneral arbitration clauses, such as those referring to 'all disputes' or 'all disputes concerning the interpretation of the agreement,' taken alone do not meet the clear and unmistakable requirement of [*Wright*]." (*Carson, supra,* 175 F.3d at p. 332.)

claims.[5] Again, language referencing "all causes of action" is markedly different than language referencing "disputes" as we have in the instant CBA. The CBAs at issue here contain no such explicit references to statutory "claims" or "causes of action." Moreover, the *Alderman* court was speaking descriptively and not quoting particular language that would meet the explicit waiver requirement. *Alderman* held the clear and unmistakable waiver test was not met by a CBA that provided "that '[a]ll disputes concerning the application, interpretation or construction of this Agreement, or any of its terms, conditions or provisions' must proceed through the grievance procedures and, if the dispute is unable to be resolved, it 'may be submitted to arbitration.' " (*Id.* at p. 470.)

Defendant relies on the third and current CBA's exclusion from mandatory arbitration claims alleging "unlawful discrimination or harassment," arguing there would be no need to make this exclusion if such statute-driven claims were otherwise not included in the arbitration clause. The clause provides in relevant part: "The initiation or filing of a complaint or legal action alleging unlawful discrimination or harassment with a federal, state, or local agency or court shall waive the employee's and/or Union's right to pursue the same matter as a grievance pursuant to this Agreement." Only the third and most recent CBA contains this "carve out." More importantly, it is limited to discrimination and harassment claims that have already gone to litigation. Defendant contends the language would be "superfluous" if the grievance and arbitration procedure did not cover such claims in the first place. However, it appears to us to be at least equally consistent with the position that nothing in the CBAs prevents statute-driven claims from being brought in court. The provision protects defendant from the holding of numerous cases that where a CBA incorporates federal antidiscrimination laws, "creating a contractual right that is coextensive with the federal statutory right" (*Wright, supra,*

[5] The full sentence reads: "A 'clear and unmistakable' waiver exists where one of two requirements is met: (1) if the arbitration clause contains an explicit provision whereby an employee specifically agrees to submit all causes of action arising out of his employment to arbitration; or (2) where the arbitration clause specifically references or incorporates a statute into the agreement to arbitrate disputes. [Citations.]" (*Alderman, supra,* 733 F.Supp.2d at p. 469.)

525 U.S. at p. 79), an arbitrator's adverse decision on a contractual discrimination claim *will not bar* a later statutory claim in court (*Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 45-47). Hence, the "decision to arbitrate an employee's *contractual* claim by itself neither waives nor precludes the subsequent litigation of *statutory* claims arising out of the same underlying facts." (*Mathews v. Denver Newspaper Agency LLP, supra,* 649 F.3d at p. 1205; see, e.g., *Barrentine v. Arkansas–Best Freight System* (1981) 450 U.S. 728, 729-730, 745-746 [employee could bring a federal suit alleging a violation of the minimum wage provisions of the FLSA even though he had already unsuccessfully submitted a claim based on the same facts to a joint grievance committee under the CBA]; *Marcario v. County of Orange, supra,* 155 Cal.App.4th at pp. 403-405, 407 [claims of workplace retaliatory reassignment in violation of the Labor Code were not precluded by prior arbitration].) The inclusion of this provision in the third CBA with respect to discrimination claims and its absence from the CBA with respect to statutory wage claims does *not* equate to a clear and unmistakable waiver of the right to a judicial forum for statutory wage claims. Rather, it could as easily indicate the parties' expectation that pursuit of a wage-based claim under the grievance and arbitration system would not bar later court action on a claimed statutory violation.

Finally, defendant argues that the union's pursuit of meal-period grievances, similar to those raised in this suit, confirms the parties' understanding of the contract's language. Defendant has nowhere pointed to any evidence in the record that SEIU Local 250 pursued any meal-period grievances when it represented employees. Nor has it pointed to evidence that the four, meal-based grievances pursued by NEMSA under the third CBA were similar to those raised in this action in that they alleged violations of California law. The only evidence of NEMSA's grievances is a declaration stating that during the term of the third CBA, NEMSA filed four "grievances regarding meal periods on behalf of the dispatchers and field employees it represents." In any event, this argument that the parties' past practice of arbitrating similar wage and hour disputes requires arbitration of a statutory wage claim was firmly rejected by *Alderman, supra,* 733 F.Supp.2d at page 470 [rejecting claim that the history of union submissions of

gratuities claims by way of grievances constitutes an admission that the statutory claims properly fall within the ambit of the CBA]. (See also *Mathews, supra,* 649 F.3d at pp. 1207-1208 [no preclusive effect accorded to decision of arbitrator on the same claims where waiver not clear and unmistakable].)

Accordingly, we conclude that none of the three CBAs in this case contains a clear and unmistakable waiver of the covered employees' rights to a judicial forum for statutory wage claims. The trial court did not err in denying defendant's motion to compel arbitration.

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Plaintiffs shall recover their costs in connection with this appeal.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.